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IN THE SUPREME COURT OF THE STATE OF UTAH

A. RULON JACKSON,
Plaintiff and Appellant,

vs.

GRANT R. CALDWELL, LEON H. JACKSON, LOYD J. CAMPBELL and LOWELL D. NIELSON,
Defendants and Respondents.

Case No. 10389

BRIEF OF APPELLANT

Appeal from the District Court of Salt Lake County, State of Utah
Aldon J. Anderson, District Judge

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NATURE OF THE CASE

In a civil action plaintiff asserts that the defendants unlawfully and wrongfully appropriated good will inherent in the relationship between a firm of public accountants and their clients and, upon dissolution failed to account to plaintiff for his share of two partnership assets, to-wit:

(a) the good will inherent in the client-public accountant relationship, and

(b) work in process at the time of termination of the firm.

Plaintiff claims alternatively that he is entitled to damages for breach of a written agreement dated March 7, 1960.

DISPOSITION IN THE LOWER COURT

The lower court held that the conduct of the defendants toward the plaintiff was not tortious; that defendants were not guilty of any breach of contract; that there was no good will inherent in the relationship between the firm of public accountants known as Messina, Jackson, Caldwell & Co. and their clients, and the court adopted defendants' theory of allocation of the asset known as work in process.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant asks this court to reverse the determinations made by the trial court and for appropriate orders and judgments as follows:

A. Determining that the defendants appropriated the bulk of the clients of the firm of Messina, Jackson, Caldwell & Co. during the term of the partnership and that defendants converted a valuable firm asset, to-wit:

the good will of the firm, in relevant respects, to the exclusion of plaintiff.

B. That the Plaintiff-Appellant is entitled to an accounting for the value of the good will inherent in a client-accountant relationship with respect to all of the clients of said firm.

C. That plaintiff is entitled to certain adjustments in the allocation of work in process of the firm of Messina, Jackson, Caldwell & Co. as of March 31, 1962.

D. Alternatively, plaintiff is entitled to damages in accordance with the provisions of a partnership agreement between the parties dated March 7, 1960.

STATEMENT OF FACTS

The material facts are presented, substantially, in the argument. This statement of facts, therefore, is presented only as a summary of the facts as they are developed in the record. At the trial, the plaintiff was incapacitated as a witness. Except for the testimony of experts and a small amount of testimony from Mrs. Jackson and acquaintances of the plaintiff, primarily with respect to his capacity for work as a public accountant at relevant times, the evidence consists of the testimony of the defendants, Lenore Bateman, the office manager of defendants, the files and records of Messina, Jackson, Caldwell & Co., a partnership and other documentary exhibits.

Plaintiff was, during the period relevant to this litigation, a public accountant. He was also authorized to practice law. However, the evidence in this case and the matters in issue here relate to his rights and property interests as a partner of the firm of Messina, Jackson, Caldwell & Co.

Some time prior to 1952, plaintiff was a partner with Marco Messina as a public accountant. Earlier, plaintiff had been a partner of the firm of Messina, Jackson & Ulmer (R. 6). Grant Caldwell became an employee of the firm of Messina, Jackson & Ulmer in 1950. Lowell Nielson became an employee at about the same time (R. 7).

As of April 1, 1955, a new partnership agreement was executed between Messina, plaintiff, Leon Jackson and Grant Caldwell whereby Caldwell became a general partner.

Marco Messina died August 19, 1959. His estate received $74,000 from the partnership during the balance of the fiscal year ending March 31, 1960 and during the next two ensuing fiscal years, in addition to the amount due to him by reason of his share of the capital account, accounts receivable, works in process and other tangible assets and "book" assets of the partnership.

In March, 1960, the defendants executed an agreement with plaintiff which was received in evidence as Exhibit 5. This agreement recited in substance that the parties recognized their obligations to the Messina estate to pay a percentage of earnings to it as a result of the last partnership agreement during Messina's lifetime (Exhibit 4) dated as of April 1, 1959. It reaffirmed the intention of the parties that the firm would continue in operation after Messina's death and that the capital accounts and participation in profits and losses thereafter would be as follows:

Rulon Jackson	30%
Grant R. Caldwell	30%
Lowell Nielson	20%
Loyd Campbell	20%

In the early part of 1961, the defendants notified plaintiff that they would not honor the 1960 agreement; that at the payout of the Messina estate the defendants refused to continue any partnership relationship with plaintiff; that they would not share clients with him. It is the position of the plaintiff-Appellant that this conduct, together with the other facts and circumstances of the case, demonstrate that by that time defendants had already assured themselves that they could already hold most of the clients of the firm and their exclusion of the plaintiff constituted an appropriation of the firm's most valuable asset, to-wit: the good will inherent in the client relationships. Such conduct also constituted a breach of contract.

In order to understand plaintiff's position in context, it is necessary to describe briefly the industry practices and the recognition of these practices insofar as the firm of Messina, Jackson, Caldwell & Co. is concerned.

The Context: Industry Recognition of Good Will.

It cannot be disputed in the instant case that public accountants buy and sell practices. The good will inherent in the relationship between professional public accountants and the client has a definitive and determinable economic value. Both local and national public accountant trade organizations have developed and accept standard procedures and formulae with respect to determining the value of these practices and the evidence disclosed extensive literature on the subject. The evidence on this phase of the case is treated in greater detail in Points I and IV of the argument. Although all of the defendants were certified public accountants, none of them offered himself as a witness to deny plaintiff's evidence with respect to the applicable industry practices and formulae or to contradict the evidence adduced by the plaintiff to the effect that the client-accountant relationships which were the asset of the firm of Messina, Jackson, Caldwell & Co. were in fact salable and had a determinable market value. Defendants called two experts, both of whom testified concerning specific sales of client accounts by public accountants in the area. In one instance the sale was by the administrator of the estate of a deceased accountant and the other was by an accountant who was leaving the area. One of the defendants' witnesses, Ernest C. Psarras, admitted that there was an industry practice of acquiring client accounts from the estate of a deceased accountant (R. 564) and from an accountant who was moving to another area and from an accountant retiring from the practice (R. 565). He also admitted that there was a market for established accounts of an accounting firm (R. 565).

Good Will of Messina, Jackson, Caldwell & Co.

The various partnership agreements executed by the parties between 1953 and 1960 (Ex. 1 through 5 inclusive) and the conduct of the partners and their employees clearly demonstrate that the partners themselves placed value upon good will with clients commensurate with the industry practice. The details of these agreements and the conduct of the parties is developed more fully in Point I of the argument. From the partnership records plaintiff demonstrated that 118 of the clients, representing 73% of the total fees received during the fiscal year ending March 31, 1962 had been clients of the firm since 1955 or prior thereto. Only six accounts, representing 3.13% of the fees received, representing new business acquired during the year prior to March 31, 1962 (Ex. 12). Messina, Jackson, Caldwell & Co. was terminated as a partnership as of March 31, 1962. The defendants took with them 149 clients, representing fees of $154,011.00. The plaintiff was totally incapacitated as a public accountant by the time of the termination of the firm. However, he entered into a business relationship with Karl Maxwell and Paul Maxwell in May, 1962, and some of the accounts who had been with the old firm became clients of Jackson, Maxwell & Co. The evidence discloses that the plaintiff actually received no personal benefit from the business of these clients, but for the purpose of computing damages the plaintiff conceded that the fees represented by these accounts and the good will inherent in them might properly be charged against the plaintiff in determining the value of the good will for which he was entitled to receive credit. Fees of the clients in this category were in the sum of $16,865 (Ex. 22). Marco Messina died in August, 1959. Under the partnership agreement which was then in effect (Ex. 4), Caldwell and Maxwell, who were the surviving general partners, were obligated to pay to the Messina estate Messina's share of the capital accounts, accounts receivable, an amount representing his share of work in process (in other words, Messina's share of the tangible and book assets of the partnership). In addition, Messina's estate received for the intangible value not reflected by any book asset or tangible value an amount equal to his share of the total earnings of the firm for the fiscal year ending March 31, 1960, and two fiscal years thereafter. The estate received approximately $74,000 on this formula. Messina's estate did not claim any interest in the clients of the firm; instead, they were retained as firm clients and firm assets. Defendants' counsel admitted, in making objections to certain testimony, that the clients were firm assets and that the individual partners did not have any proprietary interest in them (R. 234, 5).

On March 7, 1960, an agreement was executed between plaintiff and the defendants under the terms of which the parties reaffirmed their intention to continue the firm after the payout to the Messina estate, adjusted their percentage interest in the partnership and agreed that upon the death or disability of either of the parties to the agreement, certain remedies and provisions of the prior partnership agreement would be applicable (Ex. 5). Thus plaintiff was led to believe as late as the spring of 1960 that all of the assets of the old firm would be kept intact and that he would participate in them.

Appropriation of Accounts and Breach of Contract

Grant Caldwell and the other defendants began their association with Messina and Jackson as employees. Caldwell had no professional accounting experience theretofore (R. 318). He admitted that he never did desire to become a partner with the plaintiff. The only reason he signed the various partnership agreements was because of Messina (R. 319). From the beginning of his employment he began to formulate judgments as to where the clients of the firm would go in the event the partnership was terminated. At no time did he disclose to the plaintiff his lack of confidence or his secret calculations with respect to the disposition of clients (R. 246-247).

Shortly after Messina's death, Caldwell began assuming the management of the firm operations. The office manager testified that she began looking to him for what she called "leadership" (R. 349; 240 et seq). The office manager testified as to her discussions with Caldwell or the other defendants with respect to where the clients would go if the firm broke up (R. 246, 247). She had discussions with Caldwell about personnel policies, equipment purchases and other management problems, including the dissatisfaction of defendants Nielson and Campbell (R. 236-246). She treated these conversations as confidential (R. 236); she did not discuss these matters with Mr. Jackson, although it is apparent from the partnership agreement of 1959 that upon the payout of the Messina estate, Jackson and Caldwell would have equal interests in the partnership.

At least by the end of 1960 defendants Caldwell, Nielson and Campbell had conversations among themselves for the purpose of making effective a plan to carry on the firm to the exclusion of the plaintiff. At that time or in 1961, they began having meetings with the plaintiff wherein they notified him that they desired that he acquiesce in what they referred to as their plan for his "orderly retirement" (R. 328, 329). These conversations culminated in a written ultimatum to the plaintiff on April 31, 1961, received in evidence as Exhibit 11. By this time the defendants had satisfied themselves that they could retain the bulk of the clients of the firm (R. 247, 326, 327, 331). Caldwell admitted that in the 1961 discussions, plaintiff was advised not only that he would be included in the partnership after

March 31, 1962, but that the defendants would not share clients with him (R. 330).

Defendants sought to justify their demands to plaintiff during the early part of 1961 on the ground that plaintiff was offered the opportunity of purchasing their interest in the partnership on the same basis as they offered to buy him out. While such offer may have been made as far as the physical assets, receivables and similar items were concerned, the defendants admitted that they did not ever offer to share clients with the plaintiff (R. 330). Defendants had satisfied themselves that, according to their best judgment, they had the accounts in the palms of their hands (R. 334). Moreover, at the time of their demands, the defendants believed that Mr. Jackson was incapable of performing accounting functions, particularly in the field of audits (R. 331). Caldwell even told Mrs. Jackson that the plaintiff was "having a mental problem, that he should take a vacation, that he should retire" (R. 419).

It is uncontradicted that by March, 1962, plaintiff was incapacitated insofar as his public accounting work was concerned. Dr. Louis G. Moench, a practicing psychiatrist whose qualifications were admitted by the defendant (R. 235), stated that if objective symptoms were manifest at any particular time that it would be fair to assume that plaintiff's condition, known as senile psychotic reaction (R. 336) would have progressed to the point of disability at the time that such symptoms were manifest (cf 336, 339, 343). There is some dispute in the evidence as to whether the permanent disability existed before or after March 31, 1961. It would appear from the Caldwell testimony that the condition preceded that date. Mrs. Jackson's testimony was to the effect that the symptoms did not appear until after the 1961 discussions when plaintiff was notified in substance that the primary, substantial and indispensible assets of the firm, namely the clients, were being taken from him. Appellant asks this court to adopt the view that in either event, since the disability occurred prior to March 31, 1962, certain provisions of the 1959 agreement, integrated with the 1960 agreement, were applicable and that the defendants are liabel for the damages and subject to the remedies provided in these instruments. The trial court dismissed the 1960 agreement as being irrelevant to the issues and made no appropriate findings applicable thereto.

This action was filed on the 22nd day of March, 1962, after plaintiff's counsel had notified the defendants that they were in default under the agreements and were wrongfully dealing with the partnership assets. Even after the filing of the action, the defendant Caldwell continued to purport to manage and deal with the assets and affairs as though they were his own private business. He advised plaintiff that if certain demands were not satisfied, he would proceed to dispose of the assets as he chose (Ex. 17). On April 11, 1962, after the plaintiff had filed a motion to compel the production of the partnership documents for examimation (R. 26, 7), defendant Caldwell advised the plaintiff that he would deliver files of clients to the plaintiff only upon a written receipt or request from the client (Ex. 37). Defendants' new firm, organized as of April 1, 1962, stayed in the same office; continued to utilize the books and records of the old firm including the accounts receivable journal which contained substantially all of the relevant and recent information concerning work in process of the firm; used the same telephone number; and in effect, continued to maintain the same relationship to the bulk of the firm clients as had been maintained by the old firm. Subsequently, plaintiff and the defendants agreed upon certain disposition of physical assets and payments of amounts in connection with the accounts receivable of the firm as of March 31. The disposition of these assets was expressly agreed, however, to be without prejudice to the rights and contentions of the parties in the pending action. (See Exs. 38, 40, and testimony of Edward M. Bown, R. 586).

ARGUMENT

POINT I.

THE COURT ERRED IN FAILING TO FIND ON THE UNDISPUTED EVIDENCE THAT THE FIRM MESSINA, JACKSON, CALDWELL & CO. HAD AN ASSET IN THE NATURE OF GOOD WILL .

A. Good will is judicially recognized as an asset.

Section 48-1-37, U.C.A. 1953, provides in substance that the partnership assets include all property belonging to the partnership. An asset is any value or property which is salable or which may be converted into money. It is generally said that an asset is anything that would be available in the estate of a deceased to provide funds for the payment of creditors. *Black's Law Dictionary*, 4th Ed., 151-152 and authorities cited. This court has explicitly recognized that good will is an asset. In *Halverson v. Walker* (1910) 28 Ut. 262, 112 P. 804, the court recognized the value of good will in the sale of one-half interest in a barber shop. The court said:

> "Good will, as defined by Lord Eldon, means nothing more than the probability that the old customers would resort to the old place."

In *Vercimak v. Ostoich* (1950), 118 Ut. 253, 221 P(2d) 602, this court expressly recognized the existence of good will as an asset in a partnership. The court held that simply because each of the partners had the right to continue separate businesses after dissolution, it did not mean that there was no good will which attached to the business of the firm during its existence. The court stated explicitly that it chose to follow the reasoning of *Miller v. Hall*, 65 Cal. App. (2d) 200, 150 P(2d) 287, 288, and quoted with approval the following language from *Hutchins v. Page*, 204 Mass. 284, 90 NE 565, 134 Am. St. Rep. 656:

"Neither party had any right to avail himself of the good will of the business, after the termination of the partnership, without paying for it. Each could commence a new business in his own name, and take advantage of the fact that he had formerly been a member of this firm. But neither had a right, as against the other, to continue the business of the firm, and retain the advantages that comes from a direct succession and a continuation of a going business. The value of this right, so far as it had a transferable value, belonged to both; and either could insist upon having his share of the benefit of it."

The rationale of *Miller v. Hall, supra,* which this court explicitly approved in *Vercimak v. Ostoich,* was that even after dissolution of a partnership and although the partners had a right to compete with each other following the winding up of the affairs of the firm, the partners had an affirmative duty to each other to account for the value of the good will in the business. The court quoted part of the foregoing language from *Hutchins v. Page, supra,* and said:

"In Ruppe v. Utter, 76 Cal. App. 19, 243 P. 715, 717, the court said:

" 'Good will is property recognized and protected by the law as such, and capable of sale and transfer from one owner to another. It is an asset which may be sold in connection with a business.' "

* * *

"In the instant case, beyond question, the good will of this business would have had a considerable value had the business been sold to a third party."

An annotation at 65 ALR (2d) 521, et seq., superseding an earlier annotation at 44 ALR 518, deals specifically with the question of partners' duty to account to other partners for good will upon dissolution of the partnership. The summary to the annotation is, in part, as follows:

> "It seems clear that in so far as a partnership can be said to have good will, such good will is a proper item on accounting, whether the dissolution is caused by the death of a partner or otherwise brought about. Indeed, the statement that good will must be included in the accounting if it is an asset of the partnership is perhaps a tautology, since of course all assets having any value must be accounted for, and the fruitful inquiry is, rather, when can it be said that the partnership does or does not have such an asset."

Appellant submits that where the evidence demonstrates that the good will of a business has a value, the authorities hold generally, and this court has unmistakenly embraced the proposition, that the value of the asset must be taken into account in the dealing of partners between themselves upon dissolution of the firm. The Utah cases and the decisions of California and Massachusetts which they follow are unmistakably clear on this point.

B. Good will in client relationships is generally recognized by public accountants as having an ascertainable and substantial value.

In *Evans v. Gunnip,* 36 Del. 589, 135 Atl. (2d) 128, 65 ALR (2d) 513; .... Del. ...., 135 Atl(2d) 135, 65 ALR 520, the Supreme Court of Delaware held expressly that good will was a value in a public accountancy partnership and that a retiring partner was entitled to share in such good will when the remaining partners continued the business. The court referred to the testimony of public accountants at the trial to the effect that there were formulae generally used in proving the value of partnership good will. Prior conduct of the parties demonstrated that they had placed a value upon the client relationships as a distinct value of the business. The court rejected the argument that there could be no good will in a partnership involving personal services where both partners are free to compete with each other after the dissolution.

The existence of good will in relationships between public accountants and clients was unmistakably established by the evidence in the instant case. Public accountants develop and maintain files and working papers concerning the business activities of their clients and become intimately acquainted with the business and personal affairs of clients, including the very sensitive matters relating to federal and state taxation. Messina, Jackson, Caldwell & Co. had such files. The evidence disclosed that accounting work is performed for clients over a period of time, and this also was true of the subject partnership. This partnership of Messina, Jackson, Caldwell and Co. actually maintained detailed records to reflect the amount of work performed on accounts at various times of the year (Ex. 14). Defendants' "work in process" records plainly demonstrate that the nature of the accountant-client relationship is relatively continuous; that there is always a very substantial amount of unfinished work upon client problems .

It is a common occurrence for an accountant to sell a practice (R. 345, 346). The administrator or executor of a deceased accountant is able to realize substantial values for the sale of accounts. Local and national accounting organizations have established standard procedures and formulae for the sale and evaluation of accounting practices (R. 356, 358). These formulae recognize definitive values in good will. A value is placed upon a practice separate and apart from the physical assets and the so-called book value of the concern (R. 349-383).

It is not and cannot be disputed in the instant litigation that good will has a recognized value in the accounting profession. It is customary, upon the termination of partnerships engaged in public accounting work, to recognize the good will value inherent in client relationships (R. 303). The defendants' witnesses, Psarras and Kirkham (R. 561-566, R. 566-568), both of whom were certified public accountants, admitted their knowledge of the sales of public accounting practices in the area. Both of these witnesses had been involved in sales and had bid upon practices where accountants had died or were leaving the area. Mr. Psarras admitted that he knew there was a practice to acquire accounts from estates of deceased accountants (R. 564), retiring accountants (R. 565) and from accountants leaving the area (R. 564). Defendants' counsel referred to and used industry publications in cross examining plaintiff's witnesses (R. 369 et seq.). The methods of evaluating good will are discussed more fully in Point IV of this brief. It is sufficient at this juncture of the argument simply to reiterate that in the accounting profession, the existence of good will and the recognition of its values as positive, determinable assets is not disputed and cannot be disputed.

C. The history and conduct of the partners of Messina, Jackson, Caldwell & Co. demonstrate that they recognized that the good will of the partnership had a significant value.

The asset value to the firm of Messina, Jackson, Caldwell & Co. of its clients was clearly and unmistakably recognized by the partners and its employees.

Grant Caldwell admitted that the partnership actually paid employees a bonus for bringing new clients into the office (R. 605). The employee obviously was paid out of partnership funds. Patently, the partnership expected to derive a benefit from the expenditure of these amounts, and that part of that benefit necessarily had to be the relationship established with the client.

The individual partner's contributions to the firm in terms of the accounts brought into the firm was clearly recognized in the partnership agreements. The testimony of defendant Caldwell was, for example, that Marco Messina was responsible for bringing a large percentage of clients into the firm. His participation in the partnership profits reflected his client-getting ability. During the period between 1953 and 1955, he was credited with 62% of the capital and shared in 62% of the profits (Ex. 1). Between 1955 and 1958, his percentage was 50%. Thereafter until his death his percentage was 45% (Ex. 4). He maintained this interest in the profits and the capital notwithstanding the admitted fact that he did not perform audit functions on firm accounts.

Conversely, Grant Caldwell became an employee in 1950, and from the beginning was doing audit work. Yet his partnership participation was nominal until 1955 when he was entitled to receive 20% (Ex. 2). The 1955 agreement provided that upon dissolution of the firm a "division of client accounts shall be made with the withdrawing partner based upon such facts as contribute to an equitable and fair settlement of the remaining partners with the withdrawing partner, provided that upon withdrawal of Grant Caldwell, he shall be entitled to a division of client accounts obtained by the partnership after March 31, 1955." (Ex. 2, Art. VIII).

The partnership agreements over a period of more than ten years implicitly recognized a value in the business separate and apart from the physical assets as such or the value of the assets as reflected on the partnership books. The understanding was that, upon voluntary withdrawal of a partner prior to 1958, Grant Caldwell would not share in the client accounts (Ex. 2, Art. VIII). Upon death or incapacity, in the 1955 and 1958 agreements and upon death in the 1959 agreement, the intangible "going concern" worth was recognized by requiring payment to the disabled partner or the estate of the deceased in the amount represented by a share of earnings of the firm during the year of death or disability and for the two subsequent fiscal years. The 1955, 1958, and 1959 agreements are substantially similar with respect to the formula used in calculating this value. The estate of the deceased or the disabled partner was to receive the book value of its capital account plus his percentage of profits in the receivables billed but not collected at the appropriate date, plus a percentage of work in process. In addition to these amounts, the disabled partner or the estate of the deceased was to receive a designated share of the profits of the firm for the balance of the fiscal year in which death or disability occurred and the succeeding two fiscal years (Ex. 2, Art. X, cf Art. X of Exs. 3 and 4). It is submitted that this provision of the agreement and this concept of the partnership relationship belies defendants' argument that the good will inherent in the client relationship was to remain the property of the individual accountant who was serving the client. The analysis of the handling of this matter in the Messina estate is particularly rewarding. Messina had brought somewhere in the neighborhood of 65% of the clients into the firm, according to defendants' own calculations (Ex. 20). If the accounts had been deemed to have been his personal property rather than assets of the firm, Messina's administrator would have been able to sell these accounts in accordance with the obvious and well recognized industry practice. The proceeds of the sale would have gone into the estate and the partners would not have been able to obtain any interest in them except by bidding at the sale. When Messina died, however, the administrator did not attempt to sell the accounts; on the contrary, the firm continued to serve them and to have all of the benefits of the accountant-client relationship inherent in them. Messina's estate was paid approximately $74,000.00 as his share of the profits from the time of his death in August, 1959 through March 31, 1962 (R. 397, 400, 404; Ex. 14). The clients were retained intact for the firm.

The partnership agreement did not explicitly provide in so many words that the deceased or disabled partner was being paid a percentage of profits for his share in the good will of the business. The parties to the agreement were experienced, professional counselors in matters related to taxation and tax saving devices. It is reasonable to assume that they did not wish to reflect an asset as "good will" on the books of the surviving firm because good will, in an accounting sense, may not be subject to depreciation and could conceivably have other adverse tax consequences. The plain simple fact of the matter is, however, that the good will value of these accounts was paid to the Messina estate and that in consideration for that payment the accounts stayed with the firm.

In summary on Point I, the record is clear in this case that good will is judicially recognized as a partnership asset. Industry practice by and among public accountants is to recognize the value of the good will inherent in client relationships. The partners of Messina, Jackson, Caldwell & Co. recognized and applied the industry practice in the conduct of their business and the formation of their partnership agreements. They actually paid Messina's estate $74,000 for his share of the good will in the partnership after his death. Although the defendants are all certified public accountants, none of them offered to deny any of the relevant testimony of the plaintiff's experts with respect to industry recognition of good will or to deny plaintiff's claim that good will was recognized by the partners themselves in the Messina, Jackson & Caldwell firm.

The court's Findings of Fact and Conclusions of Law did not actually deal in any realistic sense with the positions taken by the plaintiff on this phase of the case. The trial court skirts the entire problem with the bland assertion that the plaintiff did not establish by a preponderance of the evidence that the partnership had an asset known as good will. Appellant submits that not only did the evidence preponderate to support his position but that the defendants themselves, by their own conduct and through their witnesses, admitted the validity of his contentions.

POINT II.

THE COURT ERRED IN FAILING TO DETERMINE FROM THE UNDISPUTED EVIDENCE THAT THE DEFENDANTS APPROPRIATED TO THEMSELVES, TO THE EXCLUSION OF PLAINTIFF, THE GOOD WILL OF THE PARTNERSHIP PRIOR TO THE TERMINATION OF THE FIRM.

At the trial court, the defendants argued that inasmuch as they were free to compete for the business of the clients after the firm was terminated, their failure to account to the plaintiff for the value of the accounts which they took with them did not constitute a breach of duty. The evidence showed, however, that the defendants had successfully appropriated the accounts to themselves more than a year prior to the time when the partnership actually terminated. If the defendants either individually or in concert had appropriated some tangible asset, such as an automobile, to their own use during the period of the partnership, certainly they would not argue that such conduct excused them from accounting to the plaintiff for its value. Yet, this is exactly the position taken by the defendants in the instant case insofar as their appropriation of the good will of the clients was concerned.

In relevant respects, this case is similar to *Smith v. Bull* (1958, S. Ct. Cal.), 50 Cal (2d) 294, 325 P(2d) 463. In that case the partners Smith and Bull operated an advertising agency. During approximately one year prior to the termination of the partnership, Smith was ill and was not active as a partner. The evidence was that he was away from the office part of the time. The other partner, Bull, gradually took over an account, Seaboard Finance Company, which constituted the bulk of the business of the firm. After the partnership was terminated the account stayed with Bull. When Smith died, Bull refused to credit Smith's estate for any value reflecting the good will of the firm in the Seaboard account. The evidence showed that a confederate of Bull named Roach had told an employee of the firm that the main account was "in the palm of his hand; he could take it anywhere he wanted to . . ." Bull admitted that he told various people that Smith was "erratic and eccentric and that he was taking so much medicine that his mind was affected." (Pac. 466, 467). The trial court found that the value of the good will of the partnership was $53,391.66, based upon testimony of a certified public accountant. Smith's estate was awarded half of such value. On the third rehearing of the case the Supreme Court of California held that the trial court judgment should be affirmed. Bull argued that inasmuch as he had the right to accept new business from Seaboard after the dissolution of the partnership that he should not be "penalized in damages." The California Supreme Court said:

> "This . . . argument apparently stems from defendant's theory that a dissolution of the partnership took place when he notified Smith that he intended to 'liquidate' the firm."

The court then reviewed the facts to emphasize that during the time that Smith was a member of the firm Bull's conduct was calculated to assure himself the benefit of the Seaboard account.

> "Defendant's argument that he is being penalized in damages and prohibited from accepting Seaboard employment, *after dissolution*, is devoid of merit. The judgment heretofore set forth did not purport to award plaintiff damages because of the appropriation of the Seaboard account, or any portion of the profit made by Bull from that account, but was concerned, so far as is here pertinent, with the appropriation and value of the good will of the business. (Emphasis by the court).
>
> "There is no merit to defendant's contention that a personal service organization has no good will.
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> "In Miller v. Hall, 65 Cal. App. 2d 200, 205, 150 P.2d 287, 289, where the partnership had operated by a brokerage business, the court held: 'From all of these cases, and many others, it appears to be well recognized that the good will of a business may have a considerable value, that while this value may be seriously affected by the competition of a retiring partner, the question of such value is one to be determined in the light of all the facts of a particular case, and that *where such a value exists and is appropriated by one of the former partners for his own use and benefit he may be required to account to the other partner for his interest in any such value as may appear under the circumstances*

> " *'In the instant case, beyond question, the good will of this business would have had a considerable value had the business been sold to a third party.'* " (Emphasis supplied).

The court emphasized the fact that Bull waited until he was sure that he would have the Seaboard account before he terminated the partnership with Smith. Quoting the earlier California case of *Bergum v. Weber,* 135 Cal. App(2d) 389, 392, 288 P(2d) 623, 625, the court said:

> "As the court stated in Bergum v. Weber, 136 Cal. App. 2d 389, 392, 288 P.2d 623, 625, 'The customers of a business are an essential part of its goodwill. In fact, without their continued custom goodwill ceases to exist, for goodwill is the expectation of continued public patronage. . . . "

The court compared the conduct of Bull with the results that would have been attained if Bull had sold the business as a going concern. The court pointed out that "had the Smith and Bull agency been sold to a third person, that goodwill, because of the Seaboard account, would have been considered a valuable asset of the partnership." (Pac. 469).

In the instant case it is clear that the dominating force in the operation of the partnership after Messina's death was defendant Grant Caldwell. Caldwell admitted that he had never had any professional accounting experience prior to his employment by the Messina, Jackson firm (R. 318). He admitted that he had observed and studied the partners and their clients between the time of his employment and throughout the relevant period of time (R. 319). He testified that he had never believed that Rulon Jackson was qualified to practice professional accountancy and that he had no desire to become a partner of Jackson (R. 319). He said that the only reason he signed the various partnership agreements between 1953 and 1960 was because of Messina (R. 319). Caldwell acknowledged his continuous study of the clientele of the firm (R. 319). As early as 1953, he had formulated judgments as to where the clients of the firm would go in the event the partnership was terminated. And he admitted that at no time did he disclose to the plaintiff his feelings toward him or his lack of confidence in his professional ability or his secret calculations with respect to the distribution of the clients. Following Messina's death, Caldwell assumed direct and effective management of the firm. The office manager had discussions with him with respect to personnel policies, dissatisfaction of other defendants (R. 237, 238), purchase of equipment (R. 241), and similar questions, although she did not have similar conversations with Jackson (R. 239). She also had conversations with Caldwell with respect to assignment of personnel to handle clients' business and what would happen to the account in the event of dissolution of the firm. It is admitted that neither Mrs. Bateman, the office manager, nor Grant Caldwell, nor the other defendants, discussed such matters with the plaintiff. In March, 1960, notwithstanding his secret intention to exclude plaintiff from the partnership, Grant Caldwell executed an agreement with him which clearly indicates that plaintiff was being led to believe that the partnership would continue following the pay-out of the Messina estate (Ex. 5). Caldwell knew that other accountants in the office were doing the work on the accounts which were generally referred to as Jackson's clients (R. 322). After the defendants had had ample opportunity to assure themselves that they could hold the bulk of the firm's business, they commenced having conversations with the plaintiff to the effect that he was being excluded from the firm after the payments to the Messina estate were completed. In the early part of 1961, plaintiff was notified that he should acquiesce in defendants' plan for what Caldwell brazenly characterized as plaintiff's "orderly retirement" (R. 329). Caldwell admitted that in the early 1961 discussions, and at all times thereafter, he told plaintiff that he would not continue the partnership with him after March 31, 1962 and that he would not share clients with him (R. 330). At the time of defendant's demands upon plaintiff to leave the premises, notwithstanding their solemn promises of only eight months earlier, there were discussions as to whether plaintiff could be excluded (R. 241). It became common knowledge in the office that a new firm was to be organized after the payout of the Messina estate, and that plaintiff would not participate (R. 240, 242).

The defendants' position that their conduct was justified because the clients could "go where they pleased" is obviously with tongue in cheek. Defendants' counsel admitted that all the accounts and the good will inherent in client relationships belonged to the firm (R. 234, 235). They had already assured themselves that when Rulon Jackson was pushed out the door substantially all of the clients would stay. Defendants knew that plaintiff was ill. Caldwell admitted that there was an increase in the number of incidents where plaintiff manifest a loss of memory or forgetfulness (R. 325). He related some of the office jokes about plaintiff's errors in deposit slips and the fact that his personal records were being maintained by someone else in the office (ibid). In the 1961 meetings, Caldwell told Mr. Jackson that he thought that plaintiff was "having a mental problem, that he should take a vacation, that he should retire" (R. 419).

When plaintiff was finally forced out, defendants Caldwell, Nielsen and Campbell remained in the same office, entered into a new partnership, kept all its physical files, including working papers, of the old firm, and even used the accounts receivable ledger of the old firm (R. 242, 243). And, of course, they kept the bulk of the one class of assets without which the business could not operate, namely the clients.

The Appellant asks this court to determine that, based upon the defendants' own admissions as to their conduct, that their converting the accounts to themselves prior to the termination of the partnership was tortious. The doctrine of *Smith v. Bull* is dispositive.

Summarizing on Point II, it is undisputed that the accounts of Messina, Jackson, Caldwell & Co. had a positive, determinable value at all times prior to March 31, 1962, and that they could have been sold. Indeed, they were the most valuable asset the firm possessed. The details of the methods of appropriation which Grant Caldwell and the other defendants employed to obtain these accounts are immaterial. All of the subtleties of their conduct may well be beyond direct evidence. The undisputed fact is, however, that in all relevant respects the defendants appropriated the clients. During the term of the partnership and at least prior to the ultimatums delivered by defendants to plaintiff in the spring of 1961, they had determined to their own satisfaction that this extremely valuable partnership was theirs to the exclusion of the plaintiff. They knew that they had the accounts in the palms of their collective hands; they knew that the plaintiff was ill. Appropriation of the clients of the firm was the culmination of a plan which had been formulated in the mind of Grant Caldwell seven or eight years earlier. Appellant submits that the failure of the court to apply the principles of *Smith v. Bull* requires reversal .

POINT III.

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANTS TO ACCOUNT TO THE PLAINTIFF FOR THE MARKET

VALUE OF THE GOOD WILL IN THE ACCOUNTS WHICH THEY APPROPRIATED.

Plaintiff established a precise market value of the good will represented by the clients served by Messrs. Jackson, Caldwell & Co. This evidence was adduced from knowledgeable experts with experience in the purchase and sale of accounts in the intermountain area and in the state of Utah. Donald H. Pickett, a certified public accountant with experience in accounting since 1950, identified and referred to a number of industry publications related to buying and selling of public accounting practices. The publications included the Accounting Practice Management Handbook edited by James H. McNeil, an article by Robert E. Witch published in the *Certified Public Accountant's Handbook,* which is a publication of the American Institute of Certified Public Accountants; a study made by R. Sproul entitled *"Accountant's Fees and Profits,"* published by Professional and Tradebooks, Ltd., London, 1951; a work entitled *Guides to Successful Accounting Practices* by Bernard Isaacson, who is second editor of the Practitioner's Forum, a regular department of the *Journal of Accountancy,* and various articles published in the *Jounrnal of Accountancy* with respect to retirement plans, professional ethics and variation of practices (R. 347, 348). These publications were commonly available to and used by members of the public accounting profession in the area (R. 348, 349). He testified as to the nature of the general considerations involved in the purchase of a practice (R. 350). He stated that in his judgment and as a result of his experience and studies, the formula which would represent a fair and reasonable one to be used by a willing seller and a willing buyer to arrive at a market price for a practice would be represented by 100% of the prior year's gross fees (R. 359). While there would be adjustments for non-recurring business, the industry recognized such a formula as being reasonably accurate. On cross examination, Mr. Pickett made reference to a plan described in one of the identified publications as the "Bridgeport Plan". Under that particular procedure, the purchaser would be expected to pay 100% of the gross fees of clients who had been with the firm four years or more; 75% of the fees of clients who had been with the firm from three to four years; 50% of the fees of clients having a history of two to three years, and 25% of the fees of clients being with the firm from one to two years. In addition, the purchaser would pay 25% of the amounts received as special fees during the preceding four years (R. 369). Mr. Pickett applied these formulae, together with his own experience in the purchase and sale of accounts locally and made a judgment with respect to the amount for which the clients of the Messina, Jackson, Caldwell firm could have been sold. It was his judgment that the good will value of the firm was $150,000. From this sum he deducted the good will value of the accounts served by Jackson, Maxwell & Co., the firm with whom the plaintiff became associated after the termination of the partnership with the defendants. From Mr. Jackson's share of Messina, Jackson, Caldwell clients ($75,00 he deducted the total value of the clients that wen the Jackson, Maxwell firm ($17,500) to arrive at net amount due from the defendants to the plain as the balance due plaintiff for his share of the g will of the firm, in the sum of $57,000. An applicati on a comparable basis of the generally accepted industr formula, to-wit: 100% of gross billing after deduct of non-recurring fees, would result in an award plaintiff of $60,698. An application of the Bridgepo Plan results in an award to plaintiff of $58,605. Me sina's estate received $74,000, which was 45% of t good will. One hundred percent of the good will, there fore, should be valued at $164,000, and the amou to be awarded to Mr. Jackson would be $61,085 if h payment was calculated upon the amount paid to t Messina estate. A tabulation of these factors in t valuation of good will is appended to this brief Appendix A.

The defendants called two certified public accoun ants in the area. In effect, these witnesses admitted t it was common practice to buy and sell accounts. E of them had participated in such purchases or sales a each had exercised his own judgment in the valuati of practices. Neither of these defendants denied validity of the approaches utilized by Mr. Pick Neither of them denied the applicability of the formu 100% of gross billings in an ordinary purchase sit tion. While these witnesses testified as to their kn edge in two separate distress sales, neither of t denied that a going practice could be sold in the market upon the application of one or more of the industry formulae established by plaintiff's evidence.

Although all of the defendants are certified public accountants and have access to the industry information utilized by Mr. Pickett in his valuation, none of them offered their testimony to deny either in substance or effect his conclusions as to the valuation of the good will in the firm. On the contrary, Mr. Caldwell admitted that when new partners were admitted to the firm beginning April 1, 1962, consideration was given to the amount of practice which they brought with them.

Appellant suggests that it is appropriate for this court to determine that Appellant is entitled to a judgment against the defendants in the sum of $57,500 plus interest since April 1, 1962 on the ground that it represents the lowest amount which he would receive upon application of the formulae in the record.

The approaches to the plaintiff upon the question of valuation of good will were substantially identical to those approved by the court in *Evans v. Gunnip* (S.Ct. Del. 1957) 36 Del. 580, 135 A(2d) 128, 65 ALR (2d) 1957; .... Del. ...., 135 A(2d) 134, 65 ALR(2d) 520, and *Smith v. Bull* (S. Ct. Cal. 1958), 50 Cal.(2d) 294, 325 P(2d) 463. Particularly since the defendants did not avail themselves of any opportunity to deny the validity of plaintiff's approach, and the fact that the computations concerning damages are in accordance with the undisputed industry practice, Appellant suggests that this court should instruct the lower court to make an award in a sum certain without requiring further proof on the subject.

POINT IV.

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANTS TO ACCOUNT TO PLAINTIFF FOR THE VALUE OF WORK IN PROCESS SINCE MARCH 31, 1962 BASED UPON THE PROXIMATE INVESTMENT IN SUCH ASSET PRIOR TO SAID DATE.

Defendants, acting by defendant Grant R. Caldwell, purported to make an accounting to the plaintiff after the instant action was filed for the amount of credit plaintiff was to receive for work in process. Prior to the termination date of the old firm, to-wit: March 31, 1962, it had incurred certain expenses in anticipation of fees to be paid in the future by firm clients. The amounts which were billed as of March 31, 1962 and prior thereto were accounts receivable of the firm; the parties have no substantial dispute with respect to the amount of money which the plaintiff should receive for these items. But the investment made in the fees which were still in process and unbilled as of the termination date gave rise to a substantial controversy.

It is Appellant's position that he is entitled to share in fees received from clients whose work was i process on March 31, 1962 based upon the total proportionate investment made in the fee compared with the investment made in the fee after the effective termination date. Defendants' own figures showed that the old firm had invested a total of $58,203 in the amount of fees received. The investment consisted of $6,936 in travel expense and $51,267 in time expense. These figures are from the defendants' own computations as they appear in Exhibits 14 and 32. The travel expense for the new firm for the period following March 31, 1962 was $3,760. After making an adjustment for a time rate increase made by the new firm after March 31, 1962, the defendants effectively conceded at the trial that the time expense of the new firm for which it was entitled to credit was $45,435.00 (Ex. 32). Thus, using defendants' own figures, the total investment in the fee by the new firm was $49,195, and the total investment by the old firm was $58,203. The total fee for the entire year for these same clients was $107,398. Appellant submits that the old firm should have received 54.19% of the fees, having invested 54.19% of the time and expense. The new firm would receive 45.81% of fees, having made a 45.81% investment. A tabulation of these figures appear as follows:

Item	Old Firm	New Firm	Total for Entire Fee Year
Time expense	$51,267.00	$45,435.00	$ 96,702.[illegible]
Travel expense	6,936.00	3,760.00	10,696.[illegible]
Total expense	58,203.00	49,195.00	107,398.[illegible]
Percentage of costs incurred	54.19%	45.81%	100[illegible]
Amount of fees due old firm at 54.19% of total fees ($120,861.00)			65,495.[illegible]
Amount of fees due new firm at 45.81% of total fees ($120,861.00)			55,366.[illegible]

Rather than adopting plaintiff's theory concern-ing an allocation of work in process credit, the tri[al] court followed the proposal of Grant Caldwell (Find-ing No. 20; R. 191). Under the Caldwell plan, th[e] Messina, Jackson firm would receive a total credit o[f] $52,550.75 plus travel expense of $6,936, for a tota[l] of $59,543.75. In other words, based on Mr. Caldwell's calculations, the old firm would receive only 49% [of] the fees while having incurred 54% of the expens[e]. The new firm would receive 51% of the fees whi[le] having incurred only 45% of the expense. Caldwe[ll] achieved this inequitable result by applying two mathe-matical procedures: (1) He deducted the "travel an[d] maintainment" expense from the total expenses in-curred by the respective firms. Since the old firm ha[d] travel expense of $6,936.42 and the new firm on[ly] $3,753.18, the result was to reduce the investment [of] the old firm and thereby decrease the percentage [of] fee which it would receive. (2) Caldwell made individual allocation of the fee for each client, rather than using total charges on the basis of applying a reasonable average profit allocation over the entire year. Appellant suggests that such accounting manipulation is falacious on its face because the result is inequitable. It may be that there are situations where the amounts of money invested in time expense should be credited before the fees are divided. The fees paid by clients included all expenses of the firm *including* the travel expense used in calculating the amount of the fee. The client's bill did not itemize travel expense as a separate item any more than it itemizes rent or stenographic cost. The firm's purpose in recording travel expense was only to analyze its internal operations. It is as logical to deduct stenographic expense before dividing the fee as to deduct travel expense. Would Caldwell have used that device if it had suited his purpose? The device of separate computations for each client is equally pernicious. Defendants were in control of all the records during the whole relevant period. Appellant submits that the trial court's adoption of the Caldwell computation on this point is erroneous and should be reversed. Appellant submits that a device whereby defendants come up with 51% of the fee after incurring only 45% of the expenses of service to the account was conceived by design rather than by application of pure accounting theory. Such a disparity might occur in serving 10 or 15 accounts, but defendants had 145 accounts and the work for them extended over an entire year. In a normal operation,

the results achieved by Caldwell could not happen [illegible]
would not happen.

POINT V.

THE COURT ERRED IN FAILING [illegible] FIND AND DETERMINE ALTERNATIVE-LY THAT PLAINTIFF WAS ENTITLED TO RECOVER DAMAGES FOR BREACH OF CONTRACT BETWEEN THE PARTIES DATED MARCH 7, 1960.

Plaintiff pleaded in the alternative that the defendants breached a contract dated March 7, 1960 [illegible] that plaintiff was entitled to recover damages pursuant to the provisions of that instrument. The defendants admitted the execution of the contract. The court refused to make any Findings of Fact or Conclusions of Law with respect to the issues involved on this cause of action. The court found simply that the contract was executed, but that it was immaterial to the issues in the case and completely ignored all of the other questions involved. The relevant facts with respect [illegible] the determination of the issues on this cause of action were not and cannot be disputed.

The last partnership agreement executed by Mar[illegible] Messina during his lifetime was dated as of April [illegible] 1959. Whereas the prior instruments had been prepared by the plaintiff, the 1959 agreement (Ex. 4) [illegible] prepared for the partners by the firm of Senior [illegible]

Senior (R. 227). This instrument does not explicitly provide for the continuation of the partnership after the payout of the Messina estate. The understanding that the firm would continue, however, is implicit from the fact that Messina's estate did receive its full share of payment for the value of the good will inherent in the partnership accounts, and that these accounts were served by the partnership after the estate was paid. If this had not been the intention of the parties, there would have been no reason for the surviving partners to agree to pay the estate of the deceased its share of earnings for more than two years after the date of death.

On March 7, 1960, defendants Nielsen, Campbell and Caldwell executed an agreement with the plaintiff which was received in evidence as Exhibit 5.

Paragraph 6 of the instrument contains certain provisions applicable to the distribution of profits during the time of the payout of the Messina estate and ending March 31, 1962. Certain provisions of the 1959 instrument were applicable in the event of a death of any of the partners but were not applicable in case of disability. Prior partnership agreements had provided for protection to a partner upon disability and there is no explanation of the omission of such protection in the 1959 agreement other than the fact that Marco Messina was known to have been seriously ill at the time of the execution of the 1959 instrument and the partners may have believed that he was on the verge of disability when he executed it. In any event paragraph 7 of the 1960 instrument (Ex. 5) provides as follows:

> "7. In the event of death or permanent disability of any of the parties hereto, this Agreement shall become null and void insofar as the deceased or disabled party is concerned, and his partnership participation shall be in accordance with Articles VIII, IX and X of the partnership agreement of Messina, Jackson, Caldwell & Company dated April 1, 1958 and amended as of April 1, 1959, provided, further, that in the event of death or permanent disability to any party hereto, the above agreement shall nonetheless remain binding to the surviving or remaining parties."

Article X of the 1959 agreement, which was referred to in the 1960 agreement, provides that the surviving partners shall cooperatively carry on the business to enable performance of the payout plans provided in Article XI and that he shall not compete with the partnership or serve any of the partnership clients and that he will pay the sum of $500 for each violation of his covenant plus one-half of any compensation derived from rendering the prohibited service. As explained infra, the 1960 agreement was applicable in the event of death or disability. A composite of Article X, taking into account the changes effected by the 1960 agreement, is as follows:

> "The parties hereto, each for himself, promise and agree with the other partners hereto that after the [permanent disability] of one of the

he as a survivor will continue as a partner and cooperatively carry on the partnership business for the fractional year in which [permanent disability] of one of them occurs and for the two full fiscal years thereafter, for the purpose of completing the payout to the [permanent disabled] partner (as provided for in Article IX hereinabove.)

"If a surviving partner does not cooperatively carry on the partnership business with the other surviving partner or partners for the purpose of carrying out the plan of payout to the [permanently disabled] partner as provided for in Article IX hereinabove, then such action shall constitute a withdrawal by him from the partnership. Upon such withdrawal by him he shall not be entitled nor shall he have any right to receive any payment on account of his interest in the partnership until payment in full has been made to the [permanently disabled] partner.

"Further, in order to assure full pay-off to the [disabled] partner, under Article IX hereinabove, the partners, parties hereto, each for himself covenants and agrees with the other parties hereto, that should he so withdraw from this partnership after obligation has arisen to pay off the [permanently disabled] partner and before full performance of such pay-off:

"1. That he will not serve any client of the partnership served by the partnership within one year prior to the effective date of his withdrawal from the partnership;

"2. That he will pay to the [permanently disabled] partner the sum of $500.00 for each violation of his covenant and promise hereunder

plus one-half of any compensation derived fr
rendering such prohibited service."

Caldwell admitted that he construed the 1960 agre ment to mean that in the event Jackson became incapa citated, the applicable provisions of the 1959 agre ment would become effective (R. 558, 559). There no doubt that the defendants refused to cooperative carry on the partnership business with Mr. Jackso The evidence is unmistakably clear that during th spring of 1961, they told him that they would not re main partners with him, that they would not sha accounts with him, and that they would not continu their association or any association with him as a partne Their answer admits that they refused to carry on th business as partners with him after March 31, 1962.

It is also unmistakably clear and cannot be reason ably disputed that the evidence shows that some tim before March 7, 1960, the date of the 1960 agreeme and March 31, 1962, plaintiff became totally and per manently disabled insofar as his ability to function a public accountant was concerned. Appellant contend that the evidence reasonably fixes the date of this in capacity as the spring of 1961. It was during this perio of time that Caldwell told Mrs. Jackson that in Cald well's opinion plaintiff was having mental problem that he should retire. The evidence showed that plain tiff's conduct had become so erratic prior to the spring of 1961 that it was the subject of frequent office joke Mrs. Jackson testified that she noticed no abnorm behavior of any consequence until following the ti when the plaintiff had been delivered the ultimatums by the defendants with respect to leaving the firm. Whether the appropriate date was before or after March 31, 1961, however, relates only to the plaintiff's right to obtain a proportionate share of earnings after March 31, 1963. It is conceded that he received his share of partnership earnings for the year ending March 31, 1962. His disability occurred after March 31, 1961. At least he was entitled to a percentage of the partnership earnings for the year ending March 31, 1963 plus the amount of formula damages as provided in Article X. These damages consisted of one-half of the fees from accounts serviced plus $500 for each account wrongfully serviced in violation of the agreement. Defendants serviced 149 partnership accounts after their breach. (This figure is the result of simply counting the number of clients as reflected in the partnership records and working papers in evidence, cf. Ex. 6, 14, 20). At $500 per account, plaintiff is entitled to recover $74,500 for this item. It is impossible to determine the actual earnings of the defendants after March 31, 1962 because they joined forces with other accountants and the total earnings of the firm after that date were computed on different bases. Appellant contends that a reasonable computation of such earnings would be an average for the three fiscal years ending 1960, 1961 and 1962. Such amount would be $27,203. Fifty percent of the fees received from the accounts serviced for the year following March 31, 1962 is $77,055.50. Under the contract theory, therefore, plaintiff is entitled to recover, in addition to the amounts due him for work in process as of March 31, 1962, the sum of $178,758. plus interest at 6% from March 31, 1962.

Appellant submits that under the provisions Rule 8(a) and 8(e) and the authority of *Rosander Larsen,* (1962), 14 Ut(2d) 1, 376 P(2d) 146, the Appellant is entitled to a determination of the issues presented in this cause of action. The undisputed facts support planitiff's claim for relief.

CONCLUSION

It can hardly be doubted that partners owe to each other the duty to refrain from converting partnership assets to the exclusion of each other. The error of the trial court apparently results from the failure to realize that the good will of Messina, Jackson, Caldwell & Co. was a valuable asset of the firm and that when the defendants converted the good will inherent in the client relationships to their own use they were perpetrating a wrong upon the plaintiff. As clearly decided in *Smith v. Bull,* the defendants cannot excuse their failure to account to plaintiff upon dissolution of the firm for this valuable asset by arguing that they had the right to compete with the plaintiff after dissolution when the facts demonstrate that they had converted the asset to themselves during the time that they were partners of plaintiff. The good will could have been sold either during the existence of the firm or upon its termination. Failure to account to the plaintiff for his share of value is clearly wrongful and the judgment of the trial court to the contrary requires reversal.

The work in process allocation proposed by the defendants and approved by the court does not achieve justice between the parties as far as this asset is concerned. Even though the arithmetical processes employed to reach the result may be accurate, plaintiff is entitled to share in the fees received from the clients to whom the work in process allocation is applicable upon the basis of the investment in the fee of the old firm in ratio to the total investment in the fee by the defendants' new firm after April 1, 1962. The court's ruling to the contrary requires reversal on this phase of the case.

Alternatively, this court should determine that the conduct of the defendants constitutes a breach of the agreement between them and the plaintiff of March 7, 1960, and that plaintiff is entitled to the damages provided in that instrument. Appellant submits that the damages can be computed from the existing record so that no further evidence is required. At the least, the court should remand the case for determination of damages upon the contract theory.

RESPECTFULLY SUBMITTED this 4th day of October, 1965.

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APPENDIX A

VALUATION OF GOOD WILL

Mr. Pickett's Value		100% Gross Billings after Deduction no-recurring fees		Bridgeport Plan	Total Fee	Fee Times Percent	Payment to Messina Estate for Good Will
Based on personal experience, generally accepted formulae and criteria and the relevant facts obtained from operating experience of firm.		Total fees, Schedule A	$172,526.	**Normal Fees**			
				100% fees, 4-yr. clients	$128,166.	$128,166.	$ 74,000. = 45%
				75% fees, 3-4 yr. clients	9,375.	7,031.	1,633. = 1%
		Deduct non-recurring Schedule C	13,950.	50% fees, 2-3 yr. clients	18,535.	9,268.	164,000 = 100%
				25% fees, 1-2 yr. clients	2,500.	625.	
				Non-recurring Fees			
				25% of special fees for preceding 4 yrs.*	55,800.	13,950.	
Total Value Good Will	$150,000.		$158,576.			$159,040.	$164,000.00

NET CREDIT TO PLAINTIFF FOR GOOD WILL

Appraised value of accounts serviced by Jackson, Maxwell & Co.		Total actual fee to Jackson, Maxwell & Co. minus non-recurring fees		**Normal Fees**		18,590.	The highest value in other formulae is used for comparative purposes.
				100% fees, 4-yr. clients	18,590.	0	
				75% fees, 3-4 yr. clients	0	0	
				50% fees, 2-3 yr. clients	0	0	
				25% fees, 1-2 yr. clients	0	2,325.	
Total Value Good Will	17,500.						
50% Total	75,000.		18,590.	**Non-Recurring Fees**		$ 20,915.	$ 20,915.00
Less retained	17,500.		79,288.	25% of special fees for preceding 4 yrs.*	9,300.	79,520.	82,000.00
			18,590.			20,915	20,915.00
Net Due Plt. for Good Will	$ 57,500.		$ 60,698			$ 58,605.	$ 61,085.00

*For purposes of this calculation, special fees for the year ending March 31, 1962 were assumed to be equal to the special fees for each of the three preceding years. The comparative operating statements for prior years (Ex. P-21) indicate that such assumption is conservative.